

LEGAL EFFECT OF BREACH OF WARRANTY IN CONSTRUCTION INSURANCE IN
MALAYSIA

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**LEGAL EFFECT OF BREACH OF WARRANTY IN CONSTRUCTION
INSURANCE IN MALAYSIA**

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**A master's research project report submitted in partial fulfilment of the
requirements for the award of the degree of
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DEDICATION

To my late beloved Grandmother, Hajiya Saude,
Your loss has left a hole in my heart; you remain forever etched in my heart,
I dearly missed you.
I will hold on to your legacies,

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ABSTRACT

The English insurance law underwent some changes and development with regards to breach of warranty in insurance contracts. In the UK today, once the insured breaches a continuing warranty, the insurer is simply discharged from liability as from the date of the breach of warranty but the insurance policy remains in existence. However, court decisions in Malaysia seem to suggest that a breach of warranty in construction insurance policy entitles the insurer to repudiate liability and prevents the contract of insurance from coming into existence. This misunderstanding by Malaysian courts has resulted in a legal dilemma in insurance law in Malaysia with regards to breach of warranty. Also, The Malaysian Insurance Act 1963 mainly deals with regulations of the insurance business to ensure there is proper control but the Act does not seem to have covered the matter of breach of warranty in insurance policies. Therefore, in the light of the current developments in the insurance law in the United Kingdom, this research project examined the legal effect of breach of warranty in insurance contracts in Malaysia. In doing so, the required data and information were collected from various sources which included books, articles, seminar papers, journals, Malayan Law Journal Articles, etc. It was found out that the effect of breach of a continuing warranty will result in the contract of insurance remaining in existence and the risk is being treated as having incepted at the outset but automatically coming to an end as of the date of the breach. More so, the insurer is being discharged from any future liability, although any liabilities of the insurer before the date of the breach are unaffected.

ABSTRAK

Perundangan insuran Inggeris telah melalui perubahan dan perkembangan berkaitan kemungkiran jaminan dalam kontrak insuran. Pada masa sekarang di UK, sekiranya pemegang insuran memungkiri suatu jaminan yang berterusan, syarikat insuran itu akan dikecualikan daripada liabiliti atau tanggungjawab dari tarikh kemungkiran jaminan. Walaupun begitu, polisi insuran tetap wujud. Namun demikian, keputusan mahkamah di Malaysia mencadangkan bahawa kemungkiran jaminan dalam polisi insuran pembinaan membolehkan syarikat insuran membatalkan atau menafikan liabiliti, dan mengelakkan kewujudan kontrak insuran. Salah faham oleh mahkamah Malaysia telah menyebabkan dilema dalam perundangan insuran di Malaysia tentang kemungkiran jaminan. Selain itu, Akta Insuran Malaysia 1963 lebih menyentuh tentang aspek peraturan perniagaan insuran untuk memastikan pengawalan yang tetap. Walaupun begitu, akta tersebut tidak meliputi perkara berkaitan dengan kemungkiran jaminan dalam polisi insuran. Maka, dengan perkembangan perundangan insuran di United Kingdom, penyelidikan ini dijalankan untuk memastikan kesan perundangan kemungkiran jaminan dalam kontrak insuran di Malaysia. Data dan maklumat diperoleh daripada pelbagai sumber termasuk buku, artikel, kertas persidangan, jurnal, artikel *Malayan Law Journal* dan sebagainya. Keputusan penyelidikan menunjukkan bahawa kesan kemungkiran jaminan berterusan akan wujud dalam kontrak insuran dan risiko kemungkiran ini dianggap telah dirangkumi pada awal kontrak dan akan tamat berdasarkan tempoh masa kemungkiran. Tambahan pula, syarikat insuran telah dikecualikan daripada liabiliti masa depan walaupun sebarang liabiliti sebelum tempoh masa kemungkiran tidak dipengaruhi.

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LIST OF ABBREVIATION

App. Cas.	Appeal Cases
CAR	Contractors' All Risk
Co.	Company
Ibid	Ibidem (from same source)
ICE	Institution of Civil Engineers
JCT	Joint Contracts Tribunal
JKR	Jabatan Kerja Raya (Public Works Department)
KB	King Bench
Lloyd's Rep	Lloyd's List Reports
Ltd	Limited
MIA	Marine Insurance Act 1906
MLJ	Malayan Law Journal
Ors.	Others
PAM	Pertubuhan Akitek Malaysia (Malaysian Institute of Architects)
PWD	Public Works Department
QBD	Queen Bench Division

Rev	Revised
RIBA	Royal Institute of British Architects
Sdn Bhd	Sendirian Berhad (Incorporated)
Term Rep	Term Report
UK	United Kingdom
UTM	Universiti Teknologi Malaysia
WLR	Weekly Law Report

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Risk simply means uncertainty and the results of uncertainty; it also refers to a lack of predictability about problem structure, outcomes or consequences in a decision or planning situation.”¹ Construction risk is an exposure to economic loss or gain arising from involvement in the construction process.² Today, the construction industry is subject to more risks and uncertainties than many other industries.³ The construction sector is indeed one of high risk, which grows even higher for bigger projects where many people are involved at a construction site and the possibilities for accidents are virtually countless, as such, when employers and contractors enter

¹ Hertz, D B & Thomas, H (1999) Practical Risk Analysis: and Approach Through Case Histories. John Wiley and Sons. Chichester, UK: taken from Edwards, P and Bowen, P (1999). P.16

² Perry, J.G and Hayes, R.W (2001), *Construction Projects – Know the Risks*, CME UMIST, London. P.29

³ Heidenhain, D. (2001) Managing technological risks: a challenge for professional engineering insurers. *Geneva Papers on Risk and Insurance - Issues and Practice*, 26(2), 268-276.

into construction contracts, they are basically taking risks.⁴ These construction contracts are associated with various aspects of risks, be it political risk, financial risk, technology risk, environmental risk, social risk and risks associated with the feasibility stage, design stage, construction stage and post construction stage.⁵ Therefore, in order to complete the project successfully, the parties involved must be able to manage the risks associated with the project.⁶

Risk management involves managing risks with both negative and positive outcomes.⁷ Risk management is a continuous process where the sources of uncertainties are systematically identified, their impact assessed and qualified, and their effect and likelihood managed to produce an acceptable balance between the risks and opportunities.⁸ In other words, risk management is a systematic process of identifying, assessing and responding to project risk with the overall goal of maximizing the opportunities and minimizing the consequences of a risk event.⁹

Risk identification is the first step of the risk management process.¹⁰ It is aimed at determining potential risks, i.e. those that may affect the project. During *risk assessment*, identified risks are evaluated and ranked. The goal is to prioritise risks for management.¹¹ The *risk response* process is directed at identifying a way of dealing with the identified and assessed project risks.¹² There are four main risk

⁴ Rahman, M. M. and Kumaraswamy, M. M. (2002) Risk management trends in the construction industry: moving towards joint risk management. *Engineering, Construction and Architectural Management*, 9(2), 131-151.

⁵ Rahman, M. M. and Kumaraswamy, M. M. (2002) Risk management trends in the construction industry: moving towards joint risk management. *Engineering, Construction and Architectural Management*, 9(2), 131-151

⁶ Ibid, p.131

⁷ Williams, C. A., Smith, M. L. and Peter, C. Y. (1998) *Risk management and insurance*, Irwin/McGraw-Hill, Boston, Mass. p.143

⁸ Dawson, P. J. (1997) *A hierarchical approach to the management of construction project risk*, University of Nottingham, Nottingham. P.18

⁹ PMI (2000) *A guide to the project management body of knowledge*, Newton Square, Project Management Institute. P.216

¹⁰ Ibid, p.217

¹¹ PMI (2000) *A guide to the project management body of knowledge*, Newton Square, Project Management Institute. P.219

¹² Smith, N.J., Tony, M., and Jobling, P. (2006) *Managing risk in construction projects*, 2th ed: Blackwell Publishing. Pp 205-213

response strategies: risk avoidance, risk reduction, risk retention and risk transfer.¹³ *Risk avoidance* deals with the risks by changing the project plan or finding methods to eliminate the risks.¹⁴ *Risk reduction* aims at reducing the probability and/or consequences of a risk event.¹⁵ It involves methods that reduce the severity of the loss.¹⁶ *Risk retention* or acceptance indicates that the risk remains present in the project.¹⁷ It involves accepting the loss when it occurs.¹⁸ Those risks that remain in the project after risk avoidance and reduction may be transferred to another party either inside or outside the project.¹⁹ *Risk transfer* means causing another party to accept the risk, typically by contract or by hedging.²⁰ Insurance is one type of risk transfer that uses contracts.²¹ Other times it may involve contract language that transfers a risk to another party without the payment of an insurance premium.²² Liability among construction or other contractors is very often transferred this way.²³

Construction insurance is a practice of exchanging a contingent claim for a fixed payment to protect the interests of parties involved in a construction project.²⁴ Construction insurance is a major method of managing risks in the construction industry.²⁵ Its primary function is to transfer certain risks from clients, contractors, subcontractors and other parties involved in the construction project to insurers to provide contingent funding in time of difficulty.²⁶ In a construction project, insurance is perceived to be the primary tool for risk control only when the risk management

¹³ Smith, N.J., Tony, M., and Jobling, P. (2006) *Managing risk in construction projects*, 2th ed: Blackwell Publishing. Pp 205-213

¹⁴ Ibid, pp.205-213

¹⁵ Oztas, A. and Okmen, O. (2005). Judgmental risk analysis process development in construction projects. *Building and Environment*, **40**(9), 124-125.

¹⁶ Ibid, pp 124-125

¹⁷ Barber, R. B. (2005), Understanding internally generated risks in projects. *International Journal of Project Management*, **23**(8), 584-590.

¹⁸ Ibid, 584-590

¹⁹ Akintoye, A.S. and MacLeod, M.J. (1997) Risk analysis and management in construction, *International Journal of Project Management*, Vol. 15, No. 1, pp. 31-38.

²⁰ Ibid, pp 31-38

²¹ Ibid, pp 31-38

²² Ibid, pp 31-38

²³ Ibid, pp 31-38

²⁴ Lyons, T. and Skitmore, M. (2004), Project risk management in the Queensland engineering construction industry: a survey. *International Journal of Project Management*, **22**(1), 51-61.

²⁵ Ibid, 51-61

²⁶ Ibid, 51-61

level is high and the management's strategic consciousness is low.²⁷ However, it is not always the best option for risk management.²⁸ When management's strategic consciousness increases to a certain extent, there are alternative ways to deal with risks.²⁹

Generally, standard forms of contract have been developed for the purpose of providing a balanced distribution of risk; for efficient administration of the contractual activities; for building on the experience gained from repeated use of these forms, but most of all for the optimum protection of one or both parties' interest.³⁰

In Malaysian construction industry, there are clear insurance clauses in the Standard Forms of Contracts. Under the PAM Form of Building Contract 2006; clause 18 provides for the contractor to indemnify the employer against any damage, expense, liability, loss, claim, or proceedings in respect of injury to persons or loss and or damage of the property. More so, clause 19 has explicitly provided for a contractor to insure against injury to person and loss and/or damage of property. More so, clauses 20A and 20B provide for the contractor and Employer to undertake an insurance policy for new building/works respectively. Furthermore, clause 20C provides for the Employer to take out and maintain an insurance policy for the existing building or extension.

In JKR 203A Form of Contract (Rev 2007), clause 14 is clearly requiring the contractor to indemnify the government in respect of personal injuries and damages to property while clause 15 mandates the contractor take out an insurance policy against personal injuries to persons and damages to property and to insure the works.

²⁷ Heidenhain, D. (2001) Managing technological risks: a challenge for professional engineering insurers. *Geneva Papers on Risk and Insurance - Issues and Practice*, 26(2), 268-276.

²⁸ Ibid, 268-276

²⁹ Ibid, 268-276

³⁰ Ibid, p.16

Also, clause 16 requires the contractor to effect and maintain “workmen compensation insurance” throughout the contract period for the government personnel, servants, agents or employees required under the laws of Malaysia. On the other hand, clause 18 requires the contractor to take out an insurance policy to insure the works, all materials and goods until the completion of the whole of the works notwithstanding any arrangement for sectional completion or partial occupation by the government under the contract.

The main feature of an insurance contract is that the contract is made to depend on the occurrence of an uncertain event.³¹ In *Prudential Insurance v IRC*³², Channel J., in dealing with the characteristic of a contract of insurance, stated as follows:

“It must be a contract whereby for some consideration, usually but not necessarily in periodical payments called premium, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event. Then next thing that is necessary is that the event should be one which involves some amount of uncertainty. There must be either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen.”

Section 3(1) of the Insurance Act, 1963 (Revised 1972) provides for the requirements necessary for carrying out business as insurer. The section reads as follows:

3 (1) subject to this Act, insurance business shall not be carried on in Malaysia by any person as insurer except-

³¹ Poh, C. C. (1990) *Law of Insurance*, Jurong Town, Singapore, Longman Singapore Publishers (Pte) Ltd. P.143

³² [1904] 2 KB 658 at p 663

- a) *By a company as defined in the Companies Act, 1965, or a company incorporated outside Malaysia which has an established place of business in Malaysia;*
- b) *By a society registered under the Co-operative societies Ordinance or*
- c) *By an unincorporated company established in the United Kingdom before the year 1862 which has been carrying on business as insurer in Malaysia since before the 21st January, 1963, and has an established place of business in Malaysia.*

It is worth noting however, that section 41 of the Insurance Act, 1963 (Revised 1972) has made provision for the capacity of infant to insure.³³ The section reads as follows:

“41(1) Notwithstanding any law to the contrary, a person over the age of ten years shall not by reason only of being under the age of majority lack the capacity to enter into a contract of insurance; but a person under the age of sixteen years shall not have the capacity to enter into such a contract except with the consent in writing of his parent or guardian.”

Generally, in order to establish that there is agreement between the parties, the contract must have arisen as a result of an offer by one of the parties and an acceptance of the offer by the other.³⁴ In the case of *Taylor v Allon*,³⁵ it was held that to constitute a binding contract, the contract must have been arrived at through mutual agreement and a unilateral undertaking by an insurer to run the risk without the assent of the insured did not constitute a binding agreement.” Also in the *Rust v Abbey Life Assurance Co. Ltd*,³⁶ it was held that *a contract between an insured and*

³³ Poh, C. C. (1990) *Law of Insurance*, Jurong Town, Singapore, Longman Singapore Publishers (Pte) Ltd. P.143

³⁴ Poh, C. C. (1990) *Law of Insurance*, Jurong Town, Singapore, Longman Singapore Publishers (Pte) Ltd. P.143

³⁵ [1966] 1 Q.B. 304

³⁶ [1979] 2 Lloyd's Rep. 334

the insurer was concluded when the insurer accepted an application made by the insured.

On the insurer's liability to pay on policy, the insurer must pay the indemnity promptly, on the occurrence of the insured event. If a longer period is required for the assessment of the full extent of the loss, the insurer shall be obliged to pay the undisputed amount forthwith.³⁷ It was held by *Megarry V.C.* in the case of *Medical Defence Union Ltd v Department of Trade*,³⁸ that "the contract of insurance must provide that the assured will be entitled to payment on the occurrence of the insured event". However, the insurer shall not be obliged to pay the insurance indemnity if the insured event, in case of non-life insurance, occurred due to wilful misconduct or gross negligence of the insured.³⁹ The insurer shall only be entitled to collect the premiums accrued.⁴⁰ Where a policy is avoided on grounds of misrepresentation or fraud, the policy is avoided *ab initio* and the premium paid by the insured is returned by the insurer.⁴¹ More so, in *Kettlewell v Refuge Assurance Company*,⁴² it was decided by the English Court of Appeal that where an insured has been induced by the fraudulent misrepresentation of an insurance agent to keep up an insurance policy taken out by the insured, the premium paid under the policy could be recovered. Not that alone, where a policy of insurance is avoided on the ground of mistake of fact, the contract is thereby avoided and the premium paid is returned by the insurer owing to a failure of consideration.

Among the methods used by insurers to avoid liability in insurance policy is the incorporation of the basis of contract clause.⁴³ When a person proposes to take out an insurance contract, he is usually required by the insurer to fill in a proposal

³⁷ Davis, S. D. (1996) In *Construction insurance, bonding, and risk management* (Ed, Palmer, W. J., Maloney, J. M. and John L., I. H.) McGraw-Hill Professional, New York, pp. 1-7.

³⁸ [1972] 2 W.L.R. 686 at p.690

³⁹ Davis, S. D. (1996) In *Construction insurance, bonding, and risk management* (Ed, Palmer, W. J., Maloney, J. M. and John L., I. H.) McGraw-Hill Professional, New York, pp. 1-7.

⁴⁰ Ibid, pp 1-7

⁴¹ Ibid, pp 1-7

⁴² [1908] 1 K.B. 545

⁴³ Poh, C. C. (1990) *Law of Insurance*, Jurong Town, Singapore, Longman Singapore Publishers (Pte) Ltd. P.107

form containing a number of questions to be answered correctly.⁴⁴ A standard practice of insurer is to make answers to the questions in the proposal the basis of the contract.⁴⁵ The legal effect is that their truth is made a fundamental term of the contract so that any mis-statement, whether material or not, is a ground on which the insurers may avoid liability on the policy.⁴⁶ *In China insurance Co. Ltd.v Ngau Ah Kau*,⁴⁷ the insurer relied on the basis clause to avoid liability because the proposal form included mis-statement that the insured had made no previous claims under a motor policy when in actual fact he had made a claim six years earlier. The Federal Court held, inter alia, that the truth of the statements and answers in the proposal form had become terms of the contract so that a mis-statement entitled the insurers to repudiate liability and escape paying out the insurance indemnity.

Breach of warranty or condition is another method insurers use to avoid paying out the insurance indemnity.⁴⁸ A warranty or condition must be precisely complied with and need not be material to the risk.⁴⁹ A breach may entitle the insurer to repudiate, even if remedied before the date of loss.⁵⁰ In insurance law, a warranty must be strictly observed because in most instances it is a condition precedent to recovery by the insured⁵¹. This reflects the fact that the rationale of warranties in insurance law is that the insurer only accepts the risk provided the warranty is fulfilled.

⁴⁴ AUN, W. M., AND VOHRAH, B. (2000) *The Commercial Law of Malaysia*, Selangor, Malaysia, Pearson Malaysia Sdn Bhd. P.302

⁴⁵ Ibid, p 302

⁴⁶ AUN, W. M., AND VOHRAH, B. (2000) *The Commercial Law of Malaysia*, Selangor, Malaysia, Pearson Malaysia Sdn Bhd. P.302

⁴⁷ [1972] 1 MLJ 32

⁴⁸ SOE, M. (1999) *Insurance Law of Malaysia*, Johore Bahru, Malaysia, Quins PTE Ltd, Johore Bahru, Malaysia. P. 51

⁴⁹ AUN, W. M., AND VOHRAH, B. (2000) *The Commercial Law of Malaysia*, Selangor, Malaysia, Pearson Malaysia Sdn Bhd. P.305

⁵⁰ Ibid, p. 305

⁵¹ AUN, W. M., AND VOHRAH, B. (2000) *The Commercial Law of Malaysia*, Selangor, Malaysia, Pearson Malaysia Sdn Bhd. P.305

Any breach is sufficient to enable the insurer to disclaim liability.⁵² Clearly the term warranty in insurance law bears a different meaning from that term in a contract of sale of goods.⁵³ Warranties must appear in the contract expressly or by incorporation such as a declaration that “this proposal forms the basis of the contract”.⁵⁴ In the former, they are usually in the form of a promise by the insured to do or to refrain from doing something, such as maintaining alarms or sprinkler systems in commercial fire policies.⁵⁵ In return, the insurer will guarantee to indemnify the insured in respect of any loss covered by the loss.⁵⁶

In *Teck Liong (EM) Sdn Bhd v Hong Leong Assurance Sdn Bhd*,⁵⁷ The plaintiff was issued a fire insurance policy by the defendant to cover his stock in trade stored in a warehouse. The stock in trade was destroyed by fire. The plaintiff claimed for the insured sum. The defendant argued that the plaintiff on the date of the fire did not hold any valid trading license from the Local Authority to operate its business which was a breach of warranty 9(a) of the policy. Dismissing the claim, it was held that the plaintiff was in breach of the warranty 9(a) when the fire occurred for not having such a license. Therefore, the defendant was entitled to repudiate liability to the plaintiff in respect of the plaintiff’s claim under the policy.

In *Putra Perdana Construction Sdn Bhd v AMI Insurance Bhd*,⁵⁸ the plaintiff obtained an insurance policy from the defendants. The policy included a warranty concerning fire fighting facilities and fire safety at the construction site. A fire broke out at the basement car park of one of the blocks which was still under construction causing considerable damages. Upon the plaintiff’s claim on the policy, the

⁵² Ibid, p.305

⁵³ Ibid, p 305

⁵⁴ Ibid, p 305

⁵⁵ AUN, W. M., AND VOHRAH, B. (2000) *The Commercial Law of Malaysia*, Selangor, Malaysia, Pearson Malaysia Sdn Bhd. P.305

⁵⁶ Ibid, p 305

⁵⁷ [2002] 1 MLJ 301

⁵⁸ [2005] 2 MLJ 123

defendants issued a notice of repudiation of liability under the policy on the ground that a warranty on fire fighting facilities and fire safety at the construction site was breached. Dismissing the claim with costs, it was held that, the defendants were entitled to repudiate liability to the plaintiff in respect of the plaintiff's claim under the policy. Also, warranties have to be strictly complied with, like conditions precedent. Therefore, if there is a breach of warranty entitling the insurer to repudiate liability, it matters not if the breach has no bearing or connection with the loss. When a term in a policy is stipulated to be a warranty or a condition precedent to the liability of the insurer, the warranty/condition has to be strictly complied with by the insured before the insured is entitled to bring a claim on the policy.

1.2 PROBLEM STATEMENT

English common law and the rules of equity form part of the laws of Malaysia.⁵⁹ English law can be found in the English common law and rules of equity, however, not all of England's common law and rules of equity form part of Malaysian law.⁶⁰ Section 3(1) of the Civil Law Act 1956 (Revised 1972) provides that in Peninsular Malaysia, the courts shall apply the common law of England and the rules of equity as administered in England up to the 7th day of April, 1956, while in Sabah and Sarawak, the courts shall apply the common law of England and the rules of equity, together with statutes of general application, as administered in England up to the 1st day of December 1951 and the 12th day of December 1949 respectively.⁶¹

However, in West Malaysia, further developments or changes in English common law and equity after April 7, 1956 do not become binding law, at best, they are only persuasive.⁶² Although there is no continuing reception of English law even for insurance matters as far as West Malaysia is concerned, it makes little difference in practice as more or less the same English statutes dealing with insurance matters would still be received in the whole of Malaysia.⁶³ This is because, between 7th April 1956 (the date the Civil Law Ordinance came into force for Peninsular Malaysia) and 21st January, 1963 when the Insurance Act came into force for Peninsular Malaysia, there is hardly any English insurance legislation which was enacted.⁶⁴ It is therefore submitted that the English Marine Insurance Act 1906, Life Assurance Act, 1774, Life Policies Assurance Act, 1867 and Marine Insurance (Gambling Policies) Act,

⁵⁹ Aun, W.M. (2005). *An Introduction To The Malaysian Legal System*. Revised 3rd ed. Malaysia: Pearson Malaysia Sdn. Bhd. P. 123

⁶⁰ *Ibid*, P 123.

⁶¹ Lee, M.P. (2005). *General Principles of Malaysian Law*. 5th ed. Selangor: Oxford Fajar Sdn. Bhd p 23.

⁶² Soe, M. (1999) *Insurance Law of Malaysia*, Johore Bahru, Malaysia, Quins PTE Ltd, Johore Bahru, Malaysia p 20

⁶³ *Ibid*, p.20

⁶⁴ *Ibid*, p.20

1909 would become applicable in all question or issues which arise with respect to the law of insurance for the whole of Malaysia.⁶⁵

The English Marine Insurance Act 1906 is the earliest and comprehensive governing law on general insurance warranties in The United Kingdom. With regards to warranty issues in insurance law in the UK, The Act provided the legal framework for warranties used in contract of marine insurance but this does not mean that the use of such terms is unique solely to marine insurance contracts.⁶⁶ Warranties also appear in all types of non-marine insurance contracts.⁶⁷ The rules laid down by the MIA 1906 for Marine warranties are also applied to non marine warranties in the UK.⁶⁸ It has in fact been observed on numerous occasions that the judges refer to marine insurance principles or the provisions of the MIA 1906 when dealing with a non-marine warranty.⁶⁹

In relation to breach of warranty in non-marine insurance contract, the *dictum* of Lord Mansfield in *De Hahn v Hartley*⁷⁰ suggested that “*a breach of warranty entitled the insurer to repudiate the contract*”. However, in the early nineties, the English insurance law had undergone further developments and changes with regards to breach of warranty.⁷¹ Soyer (2006) pointed out that in the UK, if a breach of warranty occurs, it has to be considered whether the warranty breached is a present or continuing warranty because their legal effects are not the same. It is only in the breach of present warranty that an insurer will repudiate liability and bring the

⁶⁵ Soe, M. (1999) *Insurance Law of Malaysia*, Johore Bahru, Malaysia, Quins PTE Ltd, Johore Bahru, Malaysia p 20

⁶⁶ SOYER, B. (2006) *Warranties in Marine Insurance*, London, UK, Cavendish Publishing Limited, London, UK p.3

⁶⁷ Ibid, p.3

⁶⁸ Ibid, p.3

⁶⁹ For example, in *thomson v Weems* (1884) 9 App Cas 671, p 684, Lord Blackburn, obiter dictum, said: ‘In my own opinion, as regards the effect of breach of warranty, the same principles apply whether the insurance is marine insurance or not’.

⁷⁰ (1786) 1 Term. Rep. 343

⁷¹ Soyer, B. (2006) *Warranties in Marine Insurance*, London, UK, Cavendish Publishing Limited, London, UK p.199

contract to an end. But if the breach is of a continuing warranty, the insurer is simply discharged from liability as from the date of the breach of warranty but the insurance policy remains in existence.

It was the decision of the House of Lords in the case of *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)*⁷² that led to the significant developments in the English insurance law.⁷³ Before *The Good Luck* case, the *dictum* of Lord Mansfield in *De Hahn v Hartley*⁷⁴ directly or indirectly handed an unfair advantage to insurers over the insured in the sense that insurance companies were using it as a tool of avoiding their own liability and escape payment on the occurrence of the perils insured against.⁷⁵ The effect of this is that parties willing to take out an insurance policy become very wary of doing so.⁷⁶ Contractors in the construction industry need to undertake a policy to insure the works, materials and goods and insure against injury to persons, loss and or damage to property.⁷⁷

The decision of the House of Lords in *The Good Luck* case brought the much needed reform in the area of breach of warranty in English insurance law and to some extent promoted a sense of fairness to parties to insurance contract.⁷⁸ It was affirmed in *The Good Luck* case⁷⁹ that:

“Once a breach of continuing warranty occurs, the insurer is simply discharged from liability as from the date of the breach. The discharge of the insurer from liability is automatic and is not dependent on any decision by

⁷² [1991] 2 Lloyd's Rep 191 (HL); [1992] 1 AC 233.

⁷³ Ibid, p.199

⁷⁴ (1786) 1 Term. Rep. 343

⁷⁵ Soyer, B. (2006) *Warranties in Marine Insurance*, London, UK, Cavendish Publishing Limited, London, UK p.199

⁷⁶ Ibid, p.199

⁷⁷ Lyons, T. and Skitmore, M. (2004), Project risk management in the Queensland engineering construction industry: a survey. *International Journal of Project Management*, **22**(1), 51-61.

⁷⁸ Soyer, B. (2006) *Warranties in Marine Insurance*, London, UK, Cavendish Publishing Limited, London, UK p.199

⁷⁹ *Bank of Nova Scotia v Hellenic Mutual War Risks Association Ltd (The Good Luck)*. [1992] 2 Lloyd's Rep 191

the insurer to treat the insurance contract as at end. The insurance contract remains in existence”.

According to Soyer, this decision is a better approach to adopt than to state that an insurer is entitled to repudiate liability for breach of warranty because the legal effect of a breach of warranty depends on whether the warranty that is breached is a present warranty (that is, warranty that relates to a period before the attachment of the risk) or a continuing warranty (warranty that relates to a period after the attachment of the risk).⁸⁰

Some warranties relate in terms of time to circumstances at the inception of the risk.⁸¹ In such cases, the warranted event or condition must be complied with at some time before the risk attaches.⁸² Lord Blackburn in *Thomson v Weems*⁸³ asserted that in cases where the warranty relates in time to circumstances at the inception of the risk, breach will result in the insurer never coming on the risk. Compliance with a warranty of this type was considered as condition precedent to the attaching of the risk. In cases where the warranty relates in time to circumstances after the inception of the risk, the breach of such warranties will not have any effect on the existence of the contract, unlike breach of present warranties.⁸⁴ In the case of breach of continuing warranty, the risk is treated as having incepted at the outset but automatically coming to an end as of the date of breach.⁸⁵

⁸⁰ Soyer, B. (2006) *Warranties in Marine Insurance*, London, UK, Cavendish Publishing Limited, London, UK p.199

⁸¹ *Ibid*, p.140

⁸² *Ibid*, p.140

⁸³ (1884) 9 App Cas 671, p 684.

⁸⁴ Tharmakulasingam, S. G. (2006) Putra Perdana Under Fire: 'An analysis into the legal effects of breaches of warranties and the Waiver/Estoppel Dichotomy in insurance law' *The Malayan Law Journal Articles* 2, 11 p.3

⁸⁵ *Ibid*, p.3

The governing statute in Malaysia in the field of insurance law is the *Insurance Act 1996*.⁸⁶ This Act mainly deals with regulations of the insurance business to ensure there is proper control but the Act has no provision relating to warranties and conditions in insurance policies, as such the issues of breach of warranty in insurance policies are not covered.⁸⁷ As such, the provisions of the *Civil Law Act 1956* may be referred to in order to provide valuable guidance on the matter.⁸⁸

Section 5(1) of the *Civil Law Act 1956* provides that:

“In all questions or issues which arise or which have to be decided in the States of West Malaysia ... with respect to the law of ... marine insurance, average, life and fire insurance ... the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.”

With the aid of this provision, English common law has often been referred to for guidance in resolving legal dilemmas in the field of insurance law.⁸⁹ Since the Malaysian Insurance Act 1963 does not seem to have covered the matter of breach of warranty in insurance policies, by virtue of section 5(1) of the Act, the decision of the House of Lords in *The Good Luck* case should be adopted by Malaysian courts.⁹⁰

According to Professor Wu Min Aun (2005), there is no legal barrier against courts in Peninsular Malaysia from making reference to subsequent developments in

⁸⁶ Singh, B. (2002) *Insurance Law Manual*, Selangor, Malaysia, Pelanduk Publications (M) Sdn Bhd, Selangor, Malaysia. P12

⁸⁷ Ibid, p.12

⁸⁸ Ibid, p.12

⁸⁹ Ibid, p.12

⁹⁰ Ibid, p.12

English law.⁹¹ Though strictly not binding, local courts may accept subsequent English authorities if in their view, it is desirable to do so in the absence of local statutory provisions or judicial guidance.⁹² Lord Scarman took note of this approach in *Jamil bin Harun v Yang Kamsiah & Anor.*,⁹³ when he said:

“Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance, the courts will have regard to the circumstances of the States of Malaysia and will be careful to apply them only to the extent that the written law permits, and no further than, in their view, it is just to do so”.

Although local courts are not bound to follow decisions of English courts, their decisions have traditionally been treated with the greatest respect.⁹⁴ When points of law are argued in local courts, English cases are frequently cited along with local cases, if any.⁹⁵ Since England has a much larger body of reported case law than Malaysia, it often happens that a point of law will be covered by an English precedent but not a local one.⁹⁶

However, the Malaysian insurance law is yet to adopt *post Good Luck* principles with regards to breach of warranty.⁹⁷ The courts in Malaysia have continued to adopt the *pre Good Luck* principles which unfairly distribute the rights and obligations of parties to insurance contract.⁹⁸ This could be justified by the

⁹¹ Aun, W.M. (2005). *An Introduction To The Malaysian Legal System*. Revised 3rd ed. Malaysia: Pearson Malaysia Sdn. Bhd. P.124

⁹² *Ibid*, P. 124

⁹³ [1984] 1 MLJ 217.

⁹⁴ Aun, W.M. (2005). *An Introduction To The Malaysian Legal System*. Revised 3rd ed. Malaysia: Pearson Malaysia Sdn. Bhd. P. 137.

⁹⁵ *Ibid*, p.137.

⁹⁶ *Ibid*, p. 137.

⁹⁷ [2006] 2 MLJ 44

⁹⁸ *Ibid* at p 44

decision of *Putra Perdana Construction v AMI Insurance*,⁹⁹ where the court held that a breach of warranty would entitle the insurer to repudiate liability and bring the insurance contract to an end. Similarly, in the case of *Teck Liong v Hong Leong Assurance*,¹⁰⁰ the court held that the insurer is entitled to repudiate liability to the plaintiff in respect of breach of warranty. Such principles of law are clearly outmoded and do not take into account the significant development in insurance law since *The Good Luck* case.

1.3 OBJECTIVE OF THE STUDY

There is a need to analyze the legal effect of breach of warranty in insurance contracts in light of the current developments in The English insurance law with the aim of offering judicial guidance to courts in Peninsular Malaysia in order to resolve the legal dilemma associated with breach of warranty in Malaysian insurance law.

1.4 SCOPE OF THE RESEARCH

The court cases referred to in this research work are Malaysian and English cases. Since the Marine Insurance Act 1906 provides the legal framework for warranties used in marine insurance and also applicable to general insurance

⁹⁹ [2005] 2 MLJ 135 *Judge Ramly Ali J. High Court of Malaya*

¹⁰⁰ [2002] 1 MLJ 307

contracts in the UK, it became pertinent to refer to court decisions that deal with breach of warranties in English marine insurance law.

The analysis will focus on legal effects of breach of continuing warranty in insurance contracts in West Malaysia. The cases are chosen from the online Malayan Law Journal published on the LexisNexis online database and from published textbooks related insurance warranties.

1.5 SIGNIFICANCE OF THE STUDY

The courts in West Malaysia have continued to adopt the *pre-Good Luck* principles with regards to breaches of warranty. In the decision of *Putra Perdana Construction v AMI Insurance*,¹⁰¹ the court held that “a breach of warranty would entitle the insurer to repudiate liability”. Such principles of law are clearly outmoded and do not take into account the significant development in the law since *The Good luck*.¹⁰²

As a matter of fact, the misunderstandings of the courts in West Malaysia on their decisions on breaches of warranty are untenable because the English insurance law has long departed from such principles.¹⁰³ In the United Kingdom today, the legal effect of breach of continuing warranty is clearly different from legal effect of

¹⁰¹ 2005] 2 MLJ 135- *supra*

¹⁰² *Ibid*, p 138

¹⁰³ [2006] 2 MLJ 83

breach of present warranty.¹⁰⁴ However, going by the court decisions in the above mentioned cases, it is not encouraging to see that in Malaysian courts, the legal effect of both continuing and present warranties were considered to be the same.¹⁰⁵

Since the Malaysian Insurance Act 1963 is silent on breach of warranty, and there is no legal barrier against courts in West Malaysia making reference to subsequent developments in English law, it became necessary for Malaysian courts to adopt the developments in the English insurance law with regards to breach of continuing warranty so as to resolve the legal dilemma that unfairly favours the insurers against the detriment of the insured. The time has come for the Malaysian courts to do so.

The bells of change in Malaysian insurance law are sounding; the time has come for Malaysian courts to ring out the old and ring in the new.¹⁰⁶

1.6 Research Methodology

Briefly, this research will be carried out in five (5) different stages:

¹⁰⁴ [2006] 2 MLJ 83

¹⁰⁵ [2006] 2 MLJ 83

¹⁰⁶ [2006] 2 MLJ 44

1.6.1. Identifying the Research Issue

Identifying the research issue is the very initial stage from the whole research. Initial literature review was done in order to obtain the overview of the research topic. In identifying the issue, firstly, it involved reading on various sources of published materials such as journals, articles, seminar papers, cases, previous research papers, or other related research materials, and electronic resources as well as World Wide Web and online e-databases from UTM library's website.¹⁰⁷ At the same time, discussions with supervisor, as well as course mates have been done to gain more ideas and knowledge relating to the topic.

1.6.2. Literature Review

The second stage in executing this research is literature review. Literature review stage is basically a stage when the researcher will be reading and also need to criticize on each and every material that has been read. Published resources, like books, journals, various standard forms of contract are the most helpful sources in this stage. Literature review involved collection of documents from the secondary data research, such as books, journals, newspapers.¹⁰⁸

¹⁰⁷ <http://www.psz.utm.my>

¹⁰⁸ Blaxter, L., *et al.* (1996). *How to Research*. Buckingham; Open University Press, pp. 109

1.6.3. Data and Information Collection

The next stage in this research is data and information collection stage. This is an important stage where it will lead the researcher towards achieving the main objectives. The sources are mainly from books, articles, seminar papers, journals, Malayan Law Journal, etc. All collected data and information will be systematically recorded. Basically the data will be divided into two types of data:

1- Primary data

- Mainly collected from Malayan Law Journal, Building Law Report and other law journals and all of it were collected through LexisNexis law database and hardcopies.

2- Secondary Data

Sources of secondary data consist of book, act, articles and seminar papers.

1.6.4 Research Analysis

During this stage, all the collected data, information, ideas, opinions and comments were specifically arranged, analyzed and interpreted based on the literature review which has been carried out. This stage could also be called the heart of the research in the sense that from this chapter; we can see how the objective has been achieved.

1.6.5 Conclusions and Recommendations

The final stage of the research is the conclusion and recommendations. It basically involves the conclusion for the findings. After the objective has been successfully achieved, a conclusion need to be made up and also at the same time, some appropriate recommendations related to the problems may be made for a better solution in relation to the arising issues or else for further research purposes.